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No. _____

**In The**
# Supreme Court of the United States

BRIAN M. LOVETT,
*Petitioner,*

v.

LAURIE LOVETT,
*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court of Illinois**

## PETITION FOR WRIT OF CERTIORARI

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*Petitioner*

## QUESTIONS PRESENTED

1. Can a state circuit court eliminate or modify the fundamental parental rights of a fit father based solely on a judge's determination that it is in the best interest of the child without a threshold showing of harm?

2. Can a state circuit court limit a fit father's speech to his child based solely on a judge's determination that it is in the best interest of the child without a threshold showing of harm?

3. Is fitness the only proper legal criterion for infringing on a parent's fundamental right to the care, control, and custody of his child?

4. Upon or during divorce, does a fit parent still retain the fundamental right to the care, control, and custody of his child?

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Mr. Brian Lovett respectfully requests certiorari to review the judgment of the Supreme Court of Illinois affirming the decision of the Appellate Court of Illinois.

## OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported as No. 103931. The opinion of the Appellate Court of Illinois First Judicial District is reported as Nos. 1-04-1602 and 1-05-0149 Consolidated. The opinion of the Circuit Court of Cook County, Illinois is reported as No. 00 D 6725.

## JURISDICTION

The judgment of the Supreme Court of Illinois denying petition for leave to appeal was entered on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1257. In accordance with Rule 29.4(c), 28 U.S.C. 2403(b) may apply. No Illinois court certified to the Illinois Attorney General the fact that the constitutionality of a statute was drawn into question.

## CONSTITUTIONAL AND STATUTORY LAW PROVISIONS

The relevant constitutional and statutory provisions involved are set forth in Appendix E, *infra*.

## STATEMENT

Petitioner filed for divorce from Respondent on April 28, 2000, approximately five months after the birth of their daughter and 2.5 years after they were married. In July, 2000, the parties attempted to reconcile but, after struggling for eleven months, both agreed they could not.

Petitioner and Respondent are both fit parents and their daughter was a happy and healthy child, as Respondent's attorney confirmed on the second day of trial: "fitness is not an issue in this case." (S.R. Vol. 3: 105 lines 2-4). The circuit court confirmed that "I don't have the State alleging neglect or abuse or dependency." (S.R. Vol. 3: 111 lines 1-2). (See also: R. Vol. 10: C2260 ¶17; R. Vol. 10: C2265;

R. Vol. 10: C2287 ¶71; R. Vol. 10: C2287 ¶72; R. Vol. 10: C2293 ¶95; R. Vol. 10: C2294 ¶97; R. Vol. 10: C2297 ¶111; see also Respondent's testimony (e.g., S.R. Vol. 7: 92-102, 151-153; Vol. 9: 97 lines 9-14; see also Respondent's attorney's argument: Vol. 11: 54 lines 2-7)). As the circuit court judge summarized:

> "We've got one child, we've got two parents. We will always have the one child and two parents, and you will be the parents of this child forever and ever, and the mom will be the mom of this child forever and ever. The dad will be the dad of this child forever and ever. But what we have is a situation... where mom and dad will no longer be living together in the same house with the child. So what do we do to make sure that that little one has a meaningful relationship with mom and dad, and [what] do we do to make sure that dad and mom have meaningful relationships with this child? That's what our case is about." (S.R. V3: 111 lines 21-24, 112 lines 1-9).

Petitioner's first attorney fired Petitioner as a client in court when he refused to accept a visitation schedule proposed by the circuit court judge and the Guardian Ad Litem for four out of every fourteen days. Shortly after Petitioner hired a replacement attorney, on March 26, 2002, the parties negotiated an agreement that attempted to set-out the temporary and permanent disposition of some of the most contentious topics while the divorce was pending (e.g., custody, parenting schedules, living arrangements, child support, future income and expenses, property). This agreement provided for equal custody and parenting time pending final judgment. Petitioner later fired his second attorney. Subsequently, Petitioner filed his appearance as *pro se* seeking to have multiple Illinois statutes and rules related to divorce declared unconstitutional.

Petitioner, *intra alia*, challenged the constitutionality of all Illinois statutes that refer to the "best interest of the child" (i.e., 750 ILCS 5/602, 603, 604, 607, 609, 610, 503 (g), and 506, as well as any other sections and rules that refer to "best interest of the child") (hereinafter "Best Interest of the Child Statutes"), on their face and as applied, which compel the state's judiciary to make "awards" of child custody and parenting time, or allocation of parental responsibilities, privileges, and parenting time, or assignment of "guardians" and "evaluators," within the context of dissolution of marriage actions and post-decree dissolution of marriage actions concerning children. Petitioner contended that the challenged statutes and rules violate well-recognized fundamental rights, including the right to due process, the right to equal protection, the right to privacy, and the right to the care, custody, control, companionship, and nurture of one's offspring embodied in the fundamental liberty interest in family, which rights are secured by the Fourteenth Amendment.

On June 1, 2004, approximately ten months after an eighteen-day, non-jury trial, and without any finding of unfitness, harm, or risk of harm, the circuit court entered a Judgment for Dissolution of Marriage (hereinafter "Judgment") denying Petitioner's request to find the referenced statutes unconstitutional. Additionally, the circuit court, *intra alia*, awarded sole custody of their daughter to Respondent with very limited visitation for Petitioner. As the Judgment states, "the Wife, LAURIE LOVETT, shall have the sole care, custody, control and education of the minor child of the parties, SAMANTHA LOVETT." (87a).

On June 11, 2004, and without any finding of unfitness, harm, or risk of harm, the circuit court ordered a permanent injunction (hereinafter "Injunction") against Petitioner on his communications with his daughter "...enjoining him from talking to Samantha about the Judgment of Dissolution of

Marriage, the appeal from that Judgment or his alleged fight for Samantha." (18a).

On November 22, 2006, the Appellate Court of Illinois issued its decision and affirmed the circuit court orders and the challenged statutes and rules. The Supreme Court of Illinois denied a petition for leave to appeal on March 28, 2007.

## REASONS FOR GRANTING THIS PETITION

### I. WHEN A STATE LAW OR RULE AFFECTS FUNDAMENTAL RIGHTS, THE TRADITIONAL STANDARD OF APPELLATE REVIEW IS ABANDONED, THERE IS NO PRESUMPTION OF CONSTITUTIONALITY, AND THE COURT IS REQUIRED TO APPLY "STRICT SCRUTINY"

Despite the well-settled and axiomatic precedent that when a state law or rule affects fundamental rights, the traditional standard of appellate review is abandoned, there is no presumption of constitutionality, and the court is required to apply "strict scrutiny," and which is cited in many decisions of this Court (e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Harris v. McRae*, 448 U.S. 297, 312 (1980)) and of those within Illinois (e.g., *Lulay v. Lulay*, 193 Ill. 2d 455, 476 (2000); *Langman v. Langman*, 325 Ill.App.3d 101, ¶32 (2001) www.versuslaw.com; *People of the State of Illinois v. R.G.*, 131 Ill. 2d 328 ¶45, 47 (1989) www.versuslaw.com), the Illinois courts rendered a decision that completely ignored these basic legal principles. After departing so far from the accepted and usual course of judicial proceedings, the Illinois courts then ignored every case from this Court, over 80 years of decisions, dealing with "fit" parents, children, and the "best interest of the child" standard.

These are not legal principles that are in dispute in any court in America. As this Court has made undoubtedly clear,

a review of statutes that impinge on fundamental rights must only use "exacting" strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Ergo, the Illinois courts erred as a matter of law by failing to apply the correct standard of review to state actions which implicate liberty interests and fundamental rights. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973). This Court's supervisory power is required.

The Judgment states: "That the Wife, LAURIE LOVETT, shall have the sole care, custody, control and education of the minor child of the parties, SAMANTHA LOVETT." (87a). Equal to Respondent, there is not any question that Petitioner had a fundamental constitutionally-protected right to make decisions concerning the care, custody, and control of his child before filing for divorce (e.g., see "rights to... raise one's children have been deemed 'essential,'... 'basic civil rights of man'" *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); "[T]he liberty... to direct the upbringing and education of children... are among the basic civil rights of man" (citations omitted) (Stevens concurring) Thornburgh v. American Coll. Of Obst. & Syn., 476 U.S. 747, 773 (1986)). However, subsequent to receiving the Judgment from the circuit court, Petitioner no longer had these "essential," "basic civil rights of man" anymore, as the circuit court eliminated them. The decision by the circuit court, and upheld by the appellate and state supreme courts, used the state statutes and procedures to negatively alter Petitioner's parental rights without the due process and equal protection required by the Fourteenth Amendment.

Fundamental rights must be evaluated under a strict scrutiny analysis. To withstand the strict scrutiny test, a statute must serve a compelling state interest, and the statute must be narrowly tailored to serve the compelling interest. It is exceptionally striking and disturbing that even the Supreme Court of Illinois, citing this Court's authority,

wrote specifically that a compelling interest is not invoked just because parents divorce:

> "The State maintains that it has an interest under these circumstances in protecting these children whose lives have been disrupted because of their parents' divorce. This interest is nothing like the compelling interests involved in cases such as R.G. and Prince. Moreover, the parents in this case, Michael and Kiley Lulay, have not been alleged to be unfit. We therefore presume that they are acting in the best interests of their children. See Troxel, 530 U.S. at ___, 147 L. Ed. 2d at 58, 120 S. Ct. at 2061." *Lulay v. Lulay*, ¶73. See also *Langman v. Langman*, ¶32.

A statute, by its mere existence "on the books," cannot overcome fundamental individual rights and liberty interests. *Troxel v. Granville*, at 65. There must exist a compelling state interest before the state can impair fundamental rights, even in the face of apparent statutory empowerment to the contrary, as evidenced by the fact that the standard of review of such a decision is one of strict scrutiny.

As both parents are fit, the circuit court lacked a narrowly tailored, compelling interest in removing Petitioner's fundamental rights to his child. "[I]f a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Harris v. McRae*, at 312.

## II. FITNESS IS THE ONLY PROPER LEGAL CRITERION FOR INFRINGING ON A PARENT'S FUNDAMENTAL RIGHT TO THE CARE, CONTROL, AND CUSTODY OF HIS CHILDREN

There are few issues on which this Court has spoken so consistently – and so eloquently – as that of parental rights. However, this Court has not heretofore decided the precise

questions presented. The two overall themes of *all* of this Court's decisions regarding parental rights is that: 1) "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship" *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), and; 2) "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, at 66.

The state courts erred as a matter of law by: a) refusing to acknowledge that fit parents are vested with a liberty interest in their children; b) by avoiding a determination that a parent's rights are fundamental, and; c) by sanctioning a divorce court's actions to deprive a biological parent of equal custodial parenting status without a finding that Petitioner was an unfit parent.

Considering what is in a child's best interest is undoubtedly important in any decision that impacts a child's well-being. However, applying the best interest of the child standard with its associated factors, by definition, is based on the personal and private biases of a judge. Yet, even in the very case cited as support by the Appellate Court of Illinois, it is clear that this Court considers application of these biases as violations of constitutional protections:

> "The question... is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of [a] ...child from the custody of its natural [parent]. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (Footnote omitted.) *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

A. Petitioner is a fit parent; no evidence exists of abuse or risk of harm.

Petitioner and Respondent are both fit parents and their daughter was a happy and healthy child, as Respondent's attorney confirmed on the second day of trial: "fitness is not an issue in this case." (S.R. Vol. 3: 105 lines 2-4). The circuit court even indicated that "I don't have the State alleging neglect or abuse or dependency." (S.R. Vol. 3: 111 lines 1-2). (See also: "Samantha has no adjustment problems and she has been thriving over the past 15 months." (25a, ¶17); "Factor 3: the Father has an excellent relationship with the Child Factor 4: the Child has no significant adjustment problems; the Child is thriving" (33a); "That on adverse examination the Wife testified that she has no concerns that the Husband will not be able to provide for the Child's basic needs, provide a proper home, food, proper education, or a safe environment. The Wife testified that she believes the Father loves the Child and the Child loves the Father and that the Child enjoys the time she spends with the Father." (67a, ¶71); "That on adverse examination the Wife testified that the Father "absolutely needs to be a participant in the Child's life", and the Wife stated, "You will always be Samantha's father; I will always be Samantha's mother. You will see her, speak to her, enjoy her, support her, share holidays with her, be a father to her." The Wife testified that the Father's relationship with the Child and the Child's relationship with the Father "is strong and will continue to get stronger" because the Father is dedicated to being a father. The Wife testified that... if (the Father) is there for the Child then the relationship will grow." (67a, ¶72); "That the Wife testified that the Child is healthy, physically active..." (77a, ¶95); "The Wife stated that her feelings changed when she recognized the importance of the Child seeing her Dad on a regular basis, frequently, with his participation..." (78a, ¶97); "The Wife testified that the Husband's strengths are that... he loves the

child, he has good teaching skills, he is very animated and athletic, he teaches the Child athletic things." (83a, ¶111).

Therefore, parental control has not faltered, not to mention that it is clear that Petitioner is an exceptional father. Ergo, and regardless of the "murky" and "dubious relevance" of the phrase (*In re Gault*, 387 U.S. 1, 16 (1967)), the State has no role as *parens patriae*. *Santosky v. Kramer*, at 766 and footnote 17.

B. The only proper criterion for infringing on a parent's fundamental right is fitness.

The Best Interest of the Child Statutes have an unmistakable and intended direct effect on the fundamental right to parent. The Best Interest of the Child Statutes place an absolute bar against a fit parent to exercise his rights. Per the Judgment, by "awarding" Respondent sole custody, the circuit court has completely deprived Petitioner of any decision-making authority and control of his daughter. Additionally, the circuit court has completely deprived Petitioner of the ability to see his daughter equally (in relation to his ex-wife). These decisions were erroneous because Petitioner was not found to be unfit. To avoid state impairment of parental rights, one need only be a "fit" parent. *Troxel v. Granville*, at 67.

The criterion for "fitness" only requires that one "adequately cares for his or her children." As long as one is fit in this regard, one is entitled to the full constitutional protection of one's liberty interest in family. Petitioner has not been shown to be an unfit parent and, therefore, the courts have no reason to inject themselves into the realm of his relationship with his daughter and separate him from her. *Stanley v. Illinois*, at 652–653. The decision by the circuit court to force itself into the private realm of Petitioner's relationship with his daughter and deprive him of his rights to his child was a flagrant violation of his full constitutional

protection of his liberty interest in family. Prior to the Best Interest of the Child Statutes, the Illinois courts understood this:

> "A court is only warranted in depriving a father of the custody of his child where the evidence discloses that the child is destitute, abandoned or dependent; that the father is living an immoral life or in vicious or disreputable circumstances; that he has neglected or treated the child cruelly or unkindly or that he may so treat the child; that he is wanting in good principles or that he is illy adapted to the care of the child on account of defects in his mental or physical qualities which prevent him from being a kind and affectionate father." *Jarrett v. Jarrett*, 348 Ill. App. 1, at ¶20 (1952) www.versuslaw.com.

The triggering mechanism of a divorce is not a sufficient-enough reason to allow the state to impermissibly intervene and interrupt the associative right of the child and parent in the parent-child relationship. As Illinois's own *Lulay v. Lulay* and *Langman v. Langman* readily assert, the state cannot support the argument that a child is in imminent harm just because the parents are divorcing, for alleged parental conflict may or may not rise to a level compelling state intervention. Where a parent is fit, the legal presumption implies that the child is not in imminent harm. Where the child is not in imminent harm, there are no competing interests to a parent's right to the care, custody, and companionship of the child. Where there are no competing interests, the child's best interests are already protected. *Santosky v. Kramer*, at 759–761.

Moreover, the fundamental right of a parent to raise his or her own child has never been premised on any kind of expertise. The right to raise one's own child as one sees fit is no more subject to any expert opinion (e.g., a judge's, a

lawyer's, an evaluator's) about a child's "best interest" than is the right to freedom of religion subject to precisely analogous "expert" opinions about consistent theology. Citizens have the right to raise their children; citizens have the right to freedom of religion – in both cases the opinions of "experts" about how well citizens exercise those rights have no bearing upon whether citizens actually possess those rights. To say otherwise is *reductio ad absurdum*, since rights that are subject to such "expert" opinions are not rights at all. This is critically important in light of the obvious inability of mental health "experts" to achieve consensus on any notions of the "best interest of the child" other than protection from abuse or criminal neglect. (S.R. Vol. 10: 166-169; see also S.R. Vol. 2: 226-236 discussing recommendations of custody evaluation report and associated "expert" witnesses must be barred as "junk science" and Petitioner's Motion in Limine (R. Vol. 5: C1007-1011)).

Therefore, the state cannot interfere by assigning a Guardian Ad Litem to protect the "best interest" of the child, as fit parents are already, by definition, protecting the child's best interest. Further, the state may not infringe on a fit parent's right to property and require him to fund an officer of the court with his private property against his will. The state also cannot interfere and require a custody evaluation to "evaluate" or identify the physical or mental state of the parties, or identify the "best interest of the child." Further, the state may not infringe on a fit parent's right to privacy and property by forcing him to subject himself to a custody evaluation/psychological review, reveal information to a stranger, and then fund the process with his private property, all against his will.

There is no significant difference between termination of a parent's rights to his children and making him a non-custodial parent with no decision-making authority or control

over his children (not to mention significantly reducing his parenting time). The entire concept of "awarding custody" is flawed; no one is awarded rights but, rather, one parent is deprived of rights. Petitioner divorced his wife – not his daughter, and the state (i.e., court) has no compelling reason for taking his daughter away from him or interfering in his child-rearing decisions. In every contested child custody case in which there is no finding of parental unfitness by clear and convincing evidence, a court always denies one parent equal protection when it apportions custody unequally between the parties and severs the legal (and often emotional) bond between the so-called "non-custodial" parent and the child. Respondent's attorney even correctly confirmed that "[t]he cases since 1999 in Illinois have almost universally rejected joint custody." (S.R. Vol. 11: 68 line 22, 69 line 1). However, mere repetition does not establish validity.

C. Petitioner has a right to privacy and a right to be an equal parent.

As there is no abuse or risk of substantial harm, and as it is a parent's right to manage a child, and as this right is a fundamental right protected by the Federal Constitution (e.g., *Troxel v. Granville*), the circuit court does not have the authority or jurisdiction to force/inject itself into Petitioner's private life (*Griswold v. Connecticut*, 381 U.S. 479, 495–496 (1965)) "under the guise of protecting the public interest" (*Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923)) through the "best interest of the child." This Court has specifically said that the

> "Due Process Clause would be offended "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was

thought to be in the children's best interest." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

Yet, this is exactly what happened here. Petitioner contends that the unequal allocation of parenting time, parental responsibilities, and rights by the trial court constituted an unconstitutional infringement of his fundamental liberty interest in his family and his rights under the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment of the Federal Constitution.

As the circuit court judge correctly claimed, Petitioner stands in the same relation to his daughter during and after the divorce proceedings as he did before the proceedings, as a divorced parent is still the parent:

> "What I have highlighted in my own personal notes as I listen to you is something that I want to stress now and that I want you and Mrs. Lovett to remember as this case proceeds, because this is just one short snapshot in time and in the time of your life and in the life of your daughter. When this case is over, the mother will still be the mother of this child. And when this case is over, the father will still be the father of this child. And I don't hear that from you. What I hear from you, Mr. Lovett, is that you haven't really grasped that the only father this child is ever going to have is you. You are her dad. The only mother this child is ever going to have is your wife. She is the mom, and divorced or married, that doesn't change. And I am listening to you and you haven't gotten to that step yet. You need to make a fast forward, sir. You will always be the father and mom will always be the mother." (Judge R. Morgan Hamilton, S.R. Vol. 3: 18 lines 14-24, 19 lines 1-8).

This relationship is independent of any other relationship that exists with any other person. A divorce does not (or, rather, should not) nullify or reduce the relationship between Petitioner and his daughter:

> "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, at 753.

The parties' divorce, even though it includes a child, does not give a court a special circumstance to usurp Petitioner's parental authority and rights. Any court decision that favors Respondent over Petitioner and interferes with Petitioner's privacy will eventually destroy an intact relationship. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, at 651. When the parties were not getting divorced, the court did not have the authority or jurisdiction to infringe or restrict one parent's fundamental rights by forcing either parent to accept an unequal parenting/custody schedule.

Petitioner accepts that dissolution of his marriage would of necessity act to diminish the amount of time spent with his child, but contends that the state's power to arbitrarily apply the statutory factors set forth specifically in 750 ILCS 5/602 or broadly in the 750 ILCS 5, Illinois Marriage and Dissolution of Marriage Act, in light of the fact that no credible evidence exists herein to implicate Petitioner as an

unfit parent, or that no "clear and present danger" exists, resulted in a capricious "custody" decision which flagrantly violates Petitioner's right to equal protection by "awarding" (or, more appropriately, allowing) him unequal parenting time and parental responsibilities as compared with Respondent. "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

The welfare of citizens, including children, is an important state interest. However, the state cannot impinge upon the protected and underlying fundamental rights of its citizens – adults or children. There is no public purpose that demands the harm and social damage to the fundamental parent-child relationship where the child is implicitly protected by a fit parent. The Best Interest of the Child Statutes do not require a threshold showing of harm and permit a court to exercise virtually infinite discretion in "allocating" parental rights and responsibilities, parenting time and "awards" of custody, "guardians" and "evaluators," with the only requirement being that the judicial outcomes be "found" – solely by the court whom has no "special wisdom" – to serve the "best interest of the child," which is, in fact, determined by the court itself. Yet, the "best interest" standard "provides little real guidance... [and] is fundamentally at odds with privacy interests." *Bellotti v. Baird*, 443 U.S. 622, 638 and 655–656 (1979).

Lacking a requirement that a child is, or ever was proven to be, in substantial harm, the Best Interest of the Child Statutes are facially unconstitutional. Frequently, the legal community uses the term "best interest of the child" to gloss over constitutional mandates and turn fit parents into criminals (e.g., removing most all rights to their children, eliminating their ability to see their children, forcing them to

pay purported child support with a threat of imprisonment if they do not). "Best interest" is actually a legal standard placing the trial judge, and hence the state, superior to fit parents. Its only proper use is after parental rights are terminated or after a threshold showing of harm. *Quilloin v. Walcott*, at 255. Courts can reasonably claim to know that the "best interests of children" means protecting children against abuse and/or criminal negligence. They cannot reasonably claim to know more. Thus, in all cases in which court decisions implement disproportionate custody schedules and privileges as between fit parents, those decisions are *per se* capricious and unconstitutionally violative of liberty interests.

As the circuit court readily admitted during the trial, two classes of parents exist: custodial and non-custodial. (S.R. Vol. 3: 155 lines 7-12). The Best Interest of the Child Statutes unnecessarily create these two classes of parents out of essentially similarly situated persons, thus committing an equal protection under-inclusive violation (i.e., treats persons with the same capabilities differently). Additionally, the Best Interest of the Child Statutes automatically place fit parents in the same group as unfit ones and subject them all to the best interest of the child legal standard, thus causing an equal protection over-inclusive violation (i.e., treats persons with different capabilities the same, and sweeps in more than it should). No contested divorce with children in Illinois can achieve a constitutional resolution under federal law where both parents' rights are implicated, for the non-custodial parent's rights are always denied, and the custodial parent's rights are always enlarged without an evidentiary standard other than the discretion (i.e., best interests) of the trial court.

The circuit court stated: "This is not a case where a child is being taken from a parent. This is a case where the child will have the same two parents, when it is over, that the child

started out with." (S.R. Vol. 3: 103 lines 18-21). Yet, the circuit court did just that, in that Petitioner is only allowed to now see his daughter 16% of the time, and he has no decision-making capability whatsoever. Petitioner asserts that there is not any difference between allowing a parent 16% visitation time (while taking away all other decision-making rights) and "a child being taken from a parent." Contrary to the circuit court's claim, this *is* a case where a child was taken from a parent, regardless of the privilege of 16% visitation time.

A statute, in and of itself, cannot trump the Federal Constitution. In this case, the so-called Best Interest of the Child Statutes are routinely utilized by the courts to effectively limit or reduce parental rights (i.e., personal liberties) because of divorce, by assigning custody when there is absolutely no finding that the parent is unfit.

A statute that allows a judge to exercise "too much discretion in every case" or "unlimited discretion" is unconstitutional because it undermines the parent's fundamental right to make decisions regarding the care and custody of the child (i.e., because the parent's decision is no longer presumed to be in the child's best interest). *City of Chicago v. Morales*, 527 U.S. 41, at ¶26 (1999) www.versuslaw.com. The Best Interest of the Child Statutes do not identify what is forbidden and what is permitted, nor do they identify any "standard of conduct" at all for that matter. *Id.*, at ¶59. Therefore, they are "vague." *Village of Hoffman Estates v. Flip-Side*, 455 U.S. 489, 498 (1982). The Best Interest of the Child Statutes allow the courts broad discretion to take over a child's life like a thief and usurp parental rights. It is a statutory flaw when a statute "...places the best-interest determination solely in the hands of the judge." *Troxel v. Granville*, at 52.

The issue here is not who achieves/receives "custody." The issue is that, under Illinois law, a parent can be deprived

of their parental right to "custody" or responsibility of their child, temporarily or permanently, based solely on the whim of the courts, absent proven criminal violent acts. By definition, any statute that limits the decision-making capability (i.e., fundamental right) of a fit parent is, on its face, unconstitutional because no set of circumstances exists under which the statute would be valid.

In addition, a statute will be held unconstitutional if it is "breathtakingly broad." *Troxel v. Granville*, at 52. 750 ILCS 5/602 and related statutes that refer to the "best interest of the child" create an intolerable tension in the law because they allow the courts extremely broad latitude to make any "custody" decision, and almost any decision for that matter (e.g., what Petitioner can and cannot say to his daughter as per the Injunction), based on its own discretion, even if Petitioner adequately cares for his daughter, and without any showing that Petitioner is an unfit parent.

The Best Interest of the Child Statutes create significant interference on Petitioner's fundamental rights and implicate his daughter's welfare.

D. Troxel v. Granville is broad in its application.

Though *Troxel v. Granville* was a case involving the wishes of grandparents against the fundamental rights of parents, this Court was crystal clear in its broad statement that:

> "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, at 67.

Additionally, this Court spoke broadly that "[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*, at 66. This Court also broadly reaffirmed its decision in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Troxel v. Granville*, at 66. Discussing *Prince v. Massachusetts*, 321 U.S. 158 (1944), this Court again continued with its broad confirmation "that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Troxel v. Granville*, at 66. Though never directly stated, this Court has forcefully implied that these decisions, starting "[m]ore than 75 years ago," apply in all parental situations. *Id.*, at 66. This Court has even broadly referred to the "decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.*, at 69.

This Court has broadly generalized that "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*, at 66. This Court has also summarized in broad terms that "[a]s we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made." *Id.*, at 72.

Twice, this Court clearly characterized *Troxel v. Granville* as "nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests." *Id.*, at 67. However, the Appellate Court of Illinois disregarded Petitioner's assertion that cases like *Troxel v. Granville* and its Illinois counterpart *Wickham v. Byrne*, 199 Ill.2d 309 (2002) are the appropriate precedent. The Appellate Court of Illinois instead claimed that these decisions "do not apply to custody proceedings under the IMDMA" because they "addressed statutes that permitted third persons to petition for child visitation." (6a)

To counter what it considers "third person" precedent like *Troxel v. Granville* and its own *Wickham v. Byrne*, the Appellate Court of Illinois brazened an unpublished Supreme Court of Illinois decision *In re A.W.J.*, 197 Ill. 2d 492 (2001) which discusses which "nonparents" (i.e., grandparents) get custody of a child after the father killed the mother and the father later dies. *In re A.W.J.* clearly indicates that "the parental interests sought to be protected... are no longer at issue in this case because [the father] has died." *Id.*, at ¶21 www.versuslaw.com. The unpublished case that the Appellate Court of Illinois brandishes against *Troxel v. Granville* is about:

> "...a minor whose father killed his mother. While A.W.J.'s father was in pretrial custody, A.W.J.'s maternal grandmother filed a custody petition in the circuit court of Du Page County pursuant to section 601(b) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/601(b) (West 1996)). The petition was opposed by the paternal grandparents. The trial court granted custody to the maternal grandmother in a final order which contained Rule 304(a) language. The paternal grandparents appealed, and the

> appellate court affirmed (316 Ill. App. 3d 91). The father died while the appeal was pending. We granted leave to appeal. 177 Ill. 2d R. 315(a). The sole question on which the paternal grandparents sought leave to appeal is whether the maternal grandmother had standing to bring the petition." *Id.*, at ¶9.

Every case from this Court dealing with fit parents, children, and the best interest of the child standard contradicts the Appellate Court of Illinois's analysis (e.g., see *Stanley v. Illinois*, at 651; *Santosky v. Kramer*, at 753; *Griswold v. Connecticut*, at 495-496; *Quilloin v. Walcott*, at 255; *Parham v. J.R.*, at 602; *Bellotti v. Baird*, at 655-656; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Prince v. Massachusetts*, at 166.)

E. A circuit court may not enjoin a fit parent's speech with his child based solely on the best interest of the child and absent a threshold showing of harm.

Freedom of speech, which is guaranteed by the First Amendment of the Federal Constitution as well as Article I of the Constitution of Illinois, protects the right of someone to communicate in ways that are unpleasant to others, without any justification for doing so. Individual rights of speech, especially to one's children, can be overridden only by a showing of a compelling state interest. The circuit court based its prior restraint, however, not on credible evidence of harm or danger or even the imminent risk of harm or danger, but on the flimsy ground (i.e., three statements explaining why Petitioner could not see his daughter as much as he used to anymore) of what the circuit court determined to be the "best interest of the child," which cannot withstand constitutional scrutiny. The Injunction does not even indicate a finding that Petitioner's daughter and/or Respondent have been harmed in any way. (18a). However, this is a constitutionally impermissible

infringement of Petitioner's substantive due process rights. *Troxel v. Granville,* at 66. Regardless of any statements Petitioner made to his daughter, this Court noted in *Parham v. J.R.*, at 603, that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."

In fact, in *Doe v Heck*, 327 F.3d 492 (7th Cir. 2003), the court implied that even corporal punishment is likely within the bounds of the fundamental right of parents:

> "In assessing the reasonableness of the defendants' actions in this case, we begin with the constitutional presumption that "fit parents act in the best interests of their children," Troxel, 530 U.S. at 68, and stress that unless government officials have evidence calling into question the fitness of a parent, there is "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, at ¶69 www.versuslaw.com.

In upholding the circuit court's Injunction against Petitioner's speech with his daughter, the Appellate Court of Illinois disregarded its own opinion *Felzak v. Hruby*, No. 2-05-0848 (Ill.App. Dist.2 07/28/2006), issued not even four months earlier, that was directly on-point for ruling as unconstitutional a court order limiting the communication that a parent has with his children regarding visitation and a court case; instead, the Appellate Court of Illinois claimed that "Illinois courts have apparently not yet addressed the issue" (9a). However, *Felzak v. Hruby* was very clear that:

> "In this case, the trial court usurped defendants' power, as parents, to decide whether to discuss the outcome of the case with their daughter. The

> topics of conversation barred by the trial court involved both Katie's visitation with her grandmother and her parents' imprisonment, both of which concern her care and upbringing. As a result, we conclude that the court's order forbidding such discussion interfered with defendants' parental liberty interests as guaranteed by the fourteenth amendment. Such an intrusion will be justified only when the state has a compelling interest. (Citations omitted.)" *Id.*, at ¶73 www.versuslaw.com.

The Appellate Court of Illinois also ignored the 7th Circuit's high-profile case addressing the unconstitutional content-based restrictions of the distribution of video games in Illinois:

> "If controlling access to allegedly "dangerous" speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and families, not the State." *E.S.A. v. Illinois*, case no. 05 C 4265 (12/02/2005, affirmed 11/27/06).

Even the Supreme Court of Illinois has strongly asserted that altering a parent's custody and overriding the decision of a parent are significant interferences, indicating that a state may only intercede in a family relationship on behalf of a child if it has a compelling interest:

> "It is the role of parents to nurture their children and to influence and shape their children's character. As the United States Supreme Court has recognized, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v.

> Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 652, 64 S. Ct. 438, 442 (1944). This "preparation for obligation" includes the parents' determination of who will be instrumental in the development of their child's personality and character. Section 607(b) (1) allows the State to usurp the decisionmaking function of parents with respect to the relationships that their children will have. This decisionmaking function lies at the core of parents' liberty interest in the care, custody, and control of their children...
>
> The court reasoned that, even though "the State neither takes the minor out of the home nor alters the parents' temporary or permanent custody of the minor, the State nevertheless intercedes, on behalf of the minor, in the family relationship." R.G., 131 Ill. 2d at 344. Thus, the statutes "significantly interfere[ ] with the family relationship and can only be justified if the State has a compelling interest." R.G., 131 Ill. 2d at 344.
>
> Likewise, by allowing the State to override the decisions of parents regarding the upbringing of their children, section 607(b) (1) significantly interferes with the fundamental rights of parents." *Lulay v. Lulay*, at ¶63, ¶65-66.

The permanent Injunction was overly broad, in that it prevents Petitioner from exercising his fundamental rights – specifically his liberty interest in the care and control of his daughter and his right to speak freely to her. *Lily of the Valley Spiritual Church v. Sims*, 169 Ill. App. 3d 624, at ¶31-33 (1988) www.versuslaw.com; *Troxel v. Granville*, at 66-67.

## CONCLUSION

In *Troxel v. Granville*, this Court found problematic the lack of a threshold showing of harm validating the state's interference in the parent's affairs. *Id.*, at 63. Also, because the state statute permitted any person to maintain a visitation petition solely on the basis of a child's best interests, the state was invested with unfettered discretion to award visitation premised on a single judge's opinion of which was the superior arrangement for the child. *Id.*, at 63.

The Best Interest of the Child Statutes place an impermissible, direct, legal obstacle between Petitioner and his child. As a result of the decisions of the Illinois courts, and without any showing of harm, Petitioner is now treated as an "inferior" parent (e.g., who has no decision-making authority, who only is "allowed" to "visit" with his daughter approximately 16% of the time, who is restricted in what he can and cannot say to her), while Respondent is now treated as a "superior" parent (e.g., who has full decision-making authority, who provides the permanent residence of the child 84% of the time, who may speak freely to her on any topic). This is not just minor interference by the state, but direct, significant, substantial, and absolute interference of a fundamental right. The concept of visitation, in and of itself, intrudes upon the fundamental right of parents to direct the care, custody, and control of their children. The Fourteenth Amendment requires that fit parents not stand on unequal footing with regards to their children. The state may not treat fit parents differently, no matter what classification scheme they use:

> "The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, (footnote omitted) and for contending that general rules are being applied in an arbitrary or discriminatory way. (footnote omitted) The

> portion of the Georgia statute at issue in this case applies equally to all parents residing in Georgia..." *Jones v. Helms*, 452 U.S. 412, 423-424 (1981). (Finding no equal protection violation.)

The Best Interest of the Child Statutes are applied in an arbitrary way and discriminatory toward "non-custodial," divorced parents without any showing of harm. The best interest standard, by itself, is inadequate to protect constitutional liberties. The Due Process Clause of the Fourteenth Amendment requires a threshold showing of harm before the best interest standard can be applied, as fit parents enjoy a presumption that their decisions regarding their children's best interests are correct. *Troxel v. Granville*, at 79-80. As the Judgment proves, Petitioner is an exceptional, committed parent and he is due the full protection of the Fourteenth Amendment:

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," Caban, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 1st day of June, 2007

Respectfully submitted,

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